

Objection to Issuance of Approval No. AW 5499/FARM ID#6370 NPDES CAFO ID NO. ING 806370,  
Concentrated Animal Feeding Operation, Talara Lykins, Jackson Count, Indiana

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Jennings Water, Inc. and Charles and Nancy Fox: Petitioners;  
Talara Lykins: Respondent/Permittee;  
Indiana Department of Environmental Management: Respondent.  
2007 OEA 114 (05-S-J-3602)

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**TOPICS:**

Final Hearing  
case in chief

Confined Feeding Operation, CFO

National Pollution Discharge Elimination System, NPDES

no discharge

water company

Zipp soil

perimeter drain

intermittent stream

drainage

wellhead

groundwater contamination

cone of depression

perched water table

immediate future harm

economic

licensed engineer

**PRESIDING JUDGE:**

Daidsen

**PARTY REPRESENTATIVES:**

Petitioner, Jennings Water:

Peter Campbell King, Esq. and Donna A. Marsh,  
Cline, King and King, P.C.

Frank DeVeau, Esq., Scott R. Alexander, Esq., and Michael Chambers, Esq.  
Sommer Barnard, P.C.

Petitioners, Charles and Nancy Fox:

*pro se.*

Respondent/Permittee, Talara Lykins:

Joseph A. Miller, Esq.

IDEM:

Kathy P. Mills, Esq., Valerie Tachtiris, Esq.

**ORDER ISSUED:**

June 29, 2007

**CATEGORY INDEX:**

Land

**FURTHER CASE ACTIVITY:**

[none]

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## Concentrated Animal Feeding Operation, Talara Lykins, Jackson Count, Indiana

**Jennings Water, Inc. and Charles and Nancy Fox: Petitioners;**

**Talara Lykins: Respondent/Permittee;**

**Indiana Department of Environmental Management: Respondent.**

**2007 OEA 114 (05-S-J-3602)**

STATE OF INDIANA )

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## ENVIRONMENTAL ADJUDICATION

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## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER DENYING**

## PETITIONS FOR ADMINISTRATIVE REVIEW

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) on Petitioner Jennings Water, Inc.’s (“Jennings Water”) and Charles and Nancy Fox’s (“Fox”) Petitions for Administrative Review of the Indiana Department of Environmental Management’s (“IDEM”) approval of a non-discharge National Pollutant Discharge Elimination System (“NPDES”) Confined Feeding Operation (“CFO”) permit ING 806370, issued to Talara Lykins. Petitioner Jennings Water was represented by Peter Campbell King, Esq. and Donna A. Marsh, of Cline, King and King, P.C., and Frank DeVeau, Esq., Scott R. Alexander, Esq., and Michael Chambers, Esq., of Sommer Barnard, P.C. Petitioners Charles and Nancy Fox represented themselves *pro se*. Respondent/Permittee Talara Lykins was represented by Joseph A. Miller, Esq. The Indiana Department of Environmental Management was represented through hearing by Kathy P. Mills, Esq., and afterward, by Valerie Tachtiris, Esq. The parties filed pleadings, responses and replies. At final hearing on May 11, 2006, May 12, 2006, August 2, 2006, and August 3, 2006, witnesses were sworn, evidence heard, and testimony presented, all of which are a part of the Court’s record.

**AND THE COURT**, being duly advised and having considered the petitions, pleadings, motions, evidence and the briefs, responses and replies, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Final Order:

**Jennings Water, Inc. and Charles and Nancy Fox: Petitioners;  
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**Findings of Fact**

1. On or about July 11, 2005, Respondent Talara Lykins (“Lykins”) submitted an application for IDEM’s approval of a Confined Feeding Operation (“CFO”). On September 13, 2005, IDEM issued CFO Approval Number ING806370 (“Permit”) to Respondent Lykins. The Permit is a non-discharge permit, but does allow land application of hog manure.
2. On September 27, 2005, Petitioner Jennings Water, Inc. (“Jennings Water”) timely filed a Petition for Administrative Review, Adjudicatory Hearing and Stay of Effectiveness of the Permit (“Petition”). Jennings Water, Inc., is a rural not-for-profit water company. (5/11/06 Tr. Page 20, line 1). Jennings Water serves 3,046 rural customers. One of those customers is a large wholesale customer, Country Squire Lakes, that serves approximately 3,000 households within a gated community. (5/11/06 Tr. Page 19, line 25; Page 20, line 4). Jennings Water is in the process of upgrading its system with a \$5.7 million dollar expansion project that will allow the company to serve its current customers and the future economic development needs of Jennings County. (5/11/06 Tr. Page 20, lines 4-10).
3. In its Petition, Jennings alleged that the CFO as permitted would endanger and/or contaminate its well water field located just over a mile away from the CFO, and stated numerous contentions for being aggrieved and adversely affected by IDEM’s approval of the Permit:
  - a. Jennings Water provides water to approximately 3,046 customers and has plans to increase its customer base.
  - b. The close proximity of the CFO to Jennings Water will endanger the well field and/or allow the well field to be contaminated as a result of the CFO’s operations, the storage of manure in the concrete pits, and the land application of manure.
  - c. The CFO’s manure pits are prone to shifting, cracking and leaking.
  - d. Any leaching of manure or manure byproducts will endanger and/or contaminate Jennings Water’s well fields.
  - e. The public health and welfare of Jennings Water’s customers would be severely jeopardized if this well field is contaminated
  - f. If Jennings Water’s well field was contaminated, there would be serious economic ramifications for Jennings Water, and economic development in Jennings County as a whole would be seriously jeopardized by a contaminated water source.

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4. On September 19, 2005, Charles D. Fox and Nancy A. Fox (collectively “the Foxes”) filed a petition for administrative review of the issuance of the permit. The Foxes alleged that the proposed CFO would endanger and/or contaminate the local community due to:
  - a. “Wrong soil type (zipp) for building structures of any kind due to shrink/swell tendencies and seasonal high water table at or above ground level 7 months out of the year.”
  - b. “Inadequate structural design of the pit and foundation on this soil type will lead to failure resulting in nitrate pollution of ground water.”
  - c. “Perimeter drain system as designed will only pick up leaks and carry nitrates and other pollutants directly to Luckey-Talley ditch, road ditches, and local water wells.”
5. Steven and Celeste Bowman, Robert and Melinda Sexton and Andrew and Shondra Zabrowski timely filed petitions for administrative review, which were dismissed on May 4, 2006.
6. In summary, Petitioners brought into question whether or not IDEM should have issued a permit for a building to be constructed in ground which is prone to a seasonal high or perched water table and whether or not the information provided by the Respondent Lykins was sufficient information on which IDEM could make a reasonable decision regarding the issuance of a CAFO non-discharge NPDES permit. The Petitioners raised questions as to the appropriateness of the building construction to be used in the location chosen by the Respondent Lykins.
7. In its May 4, 2006 “Findings of Fact, Conclusions of Law and Final Order Granting Motion to Dismiss Petition for Administrative Review as to Petitioners Steven and Celeste Bowman, Robert and Melinda Sexton and Andrew and Shondra Zabrowski; and Findings of Fact, Conclusions of Law and Order Denying Motion to Dismiss Petition for Administrative Review as to Petitioners Jennings Water, Inc. and Charles and Nancy Fox,” at 11-13, this Court held in relevant part:

OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law.

As the permit granted to Lykins is a ‘no discharge’ permit, OEA may not overturn IDEM’s approval of Lykins’ permit upon speculation that Lykins will allow unauthorized runoff, that Lykins will not detect or control failure of concrete tank which otherwise complied with applicable design or operation requirements and regulations, or that Lykins would fail to comply with land application rules.

IDEM’s issuance of a zero discharge NPDES/CAFO permit is not in violation of any applicable rule or statute within IDEM’s jurisdiction.

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The OEA cannot consider Petitioners' allegations of future violations as a basis for invalidating the permit.

8. A final hearing was held on May 11, 2006, May 12, 2006, August 2, 2006, and August 3, 2006. The parties filed Proposed Findings of Fact, Conclusions of Law and Orders on November 6, 2006.
9. During the hearing, the Petitioner Jennings Water presented evidence that:
  - a. The design of the CFO was inadequate to prevent the concrete from cracking and causing leaks, due to the hydrostatic uplift pressure caused by the high water table and zipp soils.
  - b. The plans submitted to IDEM were inadequate because they were not prepared by a licensed engineer.
  - c. The plans submitted to IDEM did not contain sufficient detail to determine external and internal loading structures.
  - d. The plans submitted to IDEM were inadequate because they did not conform to the 2005 edition of Midwest Plan Service Book.
  - e. The location of the CFO presents a threat to the Jennings Water well field through the potential contamination of ground water and surface water.
10. The Foxes presented testimony that the CFO would create a threat to the ground water and surface water.
11. The Respondents, Talara Lykins and IDEM, presented evidence that:
  - a. The design of the CFO had adequate safeguards to address the hydrostatic uplift pressure caused by the high water table and zipp soils and to prevent the concrete from cracking and causing leaks.
  - b. There is no requirement that the plans be submitted or reviewed by a licensed engineer.
  - c. The plans submitted to IDEM complied with all relevant statutes and regulations.
  - d. IDEM guidance directs permit applicants to utilize the 1994 edition of the Midwest Plan Service Book.
  - e. The hydrology and geology of the CFO site is such that the CFO does not present a threat to the Jennings Water well field.
12. Petitioner Jennings Water also presented evidence on the economic impact of any potential contamination of the well field. This evidence was admitted over the Respondents' objections as an offer of proof.

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13. On August 3, 2006, Jennings Water recalled two witnesses that had testified during its case-in-chief, Mr. Curry and Mr. Elliot, as rebuttal witnesses. IDEM objected to the testimony that these witnesses presented, as well as the exhibits Jennings Water presented, stating that the evidence should have been presented as part of the case-in-chief. The court allowed the witnesses to proceed, but stated that IDEM would be allowed to show cause after the testimony to present additional evidence. Following the hearing, on August 8, 2006, IDEM filed a Memorandum renewing its objection to the rebuttal testimony and exhibits (including an affidavit of Michael Sonnefeld) offered on August 3, 2006. Jennings Water filed a Response on August 18, 2006.
14. On May 3, 2007, Petitioner Jennings Water moved to supplement the record with an April 29, 2007 press release from the Indiana House of Representatives. The press release indicated that ten million dollars had been appropriated for economic development in Jennings, Ripley and Decatur Counties. On May 4, 2007, Respondents filed responsive objections.
15. The guidance document that directs permit applicants to use the Midwest Plan Service Book in preparing the plans that they submit with their permit applications was created prior to the publication of the 2005 edition of the Midwest Planning Guide.
16. Petitioner Jennings Water's engineering experts admit that they did not consult the 1994 edition of the Midwest Plan Service Book in determining whether the plans submitted by Lykins met the applicable rules and regulations. See Transcript of May 11, 2006 testimony of Robert E. Curry, p. 111 lines 3-10 and testimony of Kent Elliot, p. 138 lines 11-15.
17. Petitioner Jennings Water's well field from which it draws water to service its customers lies approximately two (2) miles from the proposed building site of the Respondent Lykins.
18. Petitioner Jennings Water has determined, by their choice, that the minimum default area, with a diameter of 3,000 feet, is sufficient to protect their well heads from contamination under the Federal Well Head Protection five (5) year plan.
19. Contamination can usually enter the aquifer from which Jennings Water draws its water in two ways. The contamination could leak through the ground and move to the aquifer with the regional ground water flow. The contamination could be pumped through the perimeter drain system and, after going through a vegetative filter strip, drain into the Lucky Talley ditch which could then carry the contamination down to the White River which flows above the aquifer.

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20. The type of soil into which water and contamination are introduced is a determining factor into the flow of water and contaminants beneath the soil. Contamination can move through the soil with the water. The proposed building will sit on ground that is highly impermeable and subject to saturation. During periods of excessive rainfall, low vegetation levels and cool temperatures, this type of ground will become saturated causing a perched water table due to the inability of the water to move easily or quickly through the soil.
21. Soil samples taken at the site show that the soil may become saturated and does not allow for good drainage. Pictures taken after heavy rainfalls further suggest that the soil at the proposed site does not drain well. Testimony by experts explained that the water leaves the site through evaporation, vegetation usage and slow percolation of the water through a fairly impermeable soil structure.
22. Because water does not move easily in this soil, the chance of contamination to the aquifer from water or contamination introduced into the soil at the site could take several years, and appears to be unlikely. Further, expert testimony explained that regional flow of water beneath the ground, or groundwater flow, at this site is towards the White River. However, local groundwater flow could be in any direction and no evidence was introduced to show the local groundwater flow at the proposed site.
23. The design of the proposed building uses a perimeter drain system to move water from around and under the building to the surface. This water is released into a vegetation area that drains into the Lucky Talley ditch.
24. The Lucky Talley ditch is an intermittent stream at the proposed site, which means that at times of the year it will have no water flow. Expert testimony was contradictory as to whether or not the ditch was a 'gaining' or 'losing' stream as it moves towards the White River. At the point the ditch enters the White River, it is downstream from the Petitioner's well heads.
25. If the ditch is a losing stream, then the contents of the ditch are deposited along its route as it moves to the White River. Thus deposited, the water and contaminants, if they exist, would then move through the groundwater. Evidence tended to suggest that the closer to the White River the water would be deposited, the more likely the groundwater flow would be in the direction of the regional flow. If the ditch is a gaining stream, then the water and contaminants, if they exist, would be deposited into the White River downstream from the Petitioner's well heads.
26. Substantial evidence was presented that the ditch could be a gaining stream in some places and a losing stream in others.

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27. The vegetation area into which the perimeter drain is pumped is meant to act as a buffer to allow for removal of contamination. If contaminants were being introduced into the perimeter drain system, they would be removed through the vegetative cover. Any other possible contaminants that might remain in the water could be detected by sight or smell as they were pumped into the vegetation buffer zone or left the vegetative buffer zone.
28. Whether the Lucky Talley ditch is a gaining or losing stream, facts introduced at the hearing provided substantial evidence that the stream is intermittent and flow through the ditch or out of the ditch is not rapid.
29. Contaminants introduced into the water, whether through the surface water or the groundwater, are only dangerous to Jennings Water and its customers if the contaminants enter into the well head area, nearly two (2) miles away.
30. Movement of water into a well head is measured through a ‘cone of depression’. Testimony was introduced at the hearing that described the shape and size of cones of depression in various conditions. Jennings Water did not introduce evidence at the hearing showing the size or shape of the cone of depression relating to their well heads.
31. Jennings Water’s experts testified at final hearing that they did not know the cone of depression for their well heads. As noted earlier, Jennings Water has chosen to use the minimum area of 3,000 feet as their five (5) year time of travel well head protection area. Reason and prudence would suggest that Jennings Water believes the cone of depression, and the five (5) year time of travel for the cone of depression for their well heads, is significantly less than 3,000 feet.
32. Petitioners failed to show with substantial evidence that they were in immediate future harm due to the issuance of the CFO non-discharge NPDES Permit when Jennings Water’s witness, under cross-examination, suggested that the Petitioner “... do some additional work,” in determining the specificity and time of travel for contaminants to reach to their well heads.
33. Substantial evidence was introduced suggesting that the time for water to move from the proposed CFO site to the Jennings Water well heads, either from surface water or groundwater, is indeterminate. Petitioner Jennings Water’s voluntary choice of the minimum 3,000 feet as their five (5) year well head protection area is strong evidence that water outside of this area is not an immediate threat to the well heads. Therefore, the court finds that the Petitioner has failed to meet its burden of proof to show with substantial evidence that the Petitioner is in danger of immediate future harm.

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34. Both Petitioners Jennings Water and Charles and Nancy Fox introduced evidence that the proposed design of the buildings was insufficient to handle the stress that would be caused by the perched water table condition that can exist at the building site. Mr. Fox presented testimony as a long-term resident, farmer and a building contractor who had personally constructed basements in the area.
35. Experts disagreed as to the impact of the perched water table on the building and the ability of the designed perimeter drain system to provide sufficient relief to the stresses placed on the buildings.
36. Substantial evidence supports the conclusion that water movement in the soil (groundwater) is very slow, causing the perched water table condition. The Respondents presented substantial evidence that the perimeter drain system design for the proposed building and location was appropriate and reasonable.
37. If water could move freely and easily through the soil, then the saturated condition of the soil would not exist for extended periods of time, as the soil samples and other introduced evidence suggest.
38. The Petitioners introduced evidence suggesting that the design of the proposed buildings were faulty and not in compliance with current standards. The Respondent introduced substantial evidence suggesting that the design of the building was adequate for the intended purpose and proposed locations and condition that exist at the proposed site and were designed in accordance with the current laws and regulations as defined by IDEM.
39. Much of the technical evidence introduced was contradictory. Experts for the Petitioners, Mr. Robert Curry and Mr. Kent Elliott are licensed engineers who specialize in water treatment and Water facility structures. CFOs require specialized expertise; therefore the legislature has taken care to establish procedures whereby state agencies may regulate the construction and operation of these facilities. Dr. Mike Veenhuizen, while not a licensed engineer in the State of Indiana at the time of the hearing (due to renewal), has extensive experience in design and building of confined livestock structures, and is a consultant on CFOs, not only to IDEM but throughout the State of Indiana and around the country.
40. Many of the opinions reached by the experts for the Petitioners were based on conclusions drawn regarding groundwater flow that the Court does not find to be persuasive. Specifically, the court is not persuaded that this building will be akin to a building that is floating in water.

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41. Substantial evidence was presented that the proposed perimeter drain system will be adequate to move water from around the building. Therefore, the pressures and stresses used by the engineers for the Petitioners would be inapplicable. The Respondents introduced substantial evidence that the procedures used and the conclusions drawn regarding the appropriateness of the building and overall application, were reasonable.
42. Substantial evidence was presented that IDEM used proper measurements as regarding the stresses associated with its proposed location in determining the adequacy of the proposed building. The court was persuaded by Dr. Veenhuizen that the determinations made in designing the building by the Respondent Lykins, and in approving the design by the IDEM were appropriate and in conformity with the regulations set forth by the State of Indiana.  
  
IDEM testified that approximately 30% of the concentrated animal feeding operations reviewed for swine are submitted by Signature Farms, who prepared the application submitted by the Respondent Lykins, and approximately 60% are submitted by Dr. Mike Veenhuizen, who testified on behalf of the Respondent Lykins that the application submitted by the Respondent Lykins and the permit issued by IDEM were adequate in their detail and were appropriate.
43. Respondents presented substantial evidence that the building design is similar to many others approved by IDEM and was appropriate and reasonable for the application. Further, IDEM presented substantial evidence that the procedures followed in determining the appropriateness of the building design for the proposed location were reasonable and in accordance with the rules and regulations under which they operate.
44. In weighing the evidence presented by all the parties, the Court is not persuaded by substantial evidence that IDEM failed to follow its rules and regulations in issuing the permit or that the design of the CFO as submitted did not meet the applicable requirements.

### **Conclusions of Law**

1. The Office of Environmental Adjudication has jurisdiction over the decisions of the Commissioner of IDEM and the parties to the controversy pursuant to Ind. Code § 4-21.5-7-3.
2. Pursuant to I.C. §§ 4-21.5-3 and 4-21.5-5, the Petitioners bear the burden of presenting substantial evidence that the permit as issued is invalid.

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3. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005).
  4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envntl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also* Ind. Code § 4-21.5-3-27(d). While the parties' evidence disputed whether IDEM's determination on the resubmitted claims complied with Ind. Code § 13-23-9-2, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." Ind. Code § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA at 129. *See also Blue River Valley*, 2005 OEA at 11, 12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.
- IDEM is authorized by the Indiana legislature to be responsible to protect the waters of the State of Indiana. In its capacity to protect the waters of the State of Indiana, IDEM is authorized to issue CAFO non-discharge NPDES Permits, in accordance with the federal programs of issuing permits under the Federal Clean Water Act enacted by the Congress of the United States.
5. As part of its review of applications requesting a CFO non-discharge NPDES Permit, IDEM reviews the proposed buildings and Water management procedures to insure that the applicant meets all of the state regulations required for receiving a CFO non-discharge NPDES Permit.
  6. IDEM duly reviewed Respondent's application and found that it met or exceeded all of the necessary regulations required by statute for the issuance of a CFO non-discharge NPDES Permit. I.C. § 13-18-10, et seq., 327 IAC, et seq.

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7. This Court's Order dated May 4, 2006 limits the issues before the Court to whether IDEM followed all applicable rules and regulations in issuing the permit. The court denied the Respondent's Motion to Dismiss the Petition for Administrative Review as to the Petitioner's Charles and Nancy Fox and Jennings Water, Inc. in its May 4, 2006 Order. This court held that issues of material fact remained as to whether or not Petitioners Charles and Nancy Fox had suffered or were likely to suffer immediate future harm so to rise to the status of being "aggrieved or adversely affected" in order to have standing to seek judicial review of the permit issued by the IDEM.
8. In its Order of May 4, 2006 denying the Respondent's Motion to Dismiss, this Court further held that in determining whether or not the Petition met statutory requirements and states a claim upon which relief may be granted, the OEA would not consider the following: 1) the economic impact of the permit on Petitioners; 2) speculation as to whether or not the Respondent Lykins will operate in accordance with the laws and regulations of the State regarding Concentrated Animal Feeding Operations; 3) allegations of future violations. Therefore, the presiding Environmental Law Judge ("ELJ") has not considered any evidence presented at trial regarding these issues.
9. This Court further held in its May 4, 2006 Order that no permit conditions conflicted with 325 IAC 15-15-14; that 327 IAC 15-15-18 does not require the permittee to submit a stormwater pollution plan to IDEM; that the OEA is not authorized to require the Respondent Lykins to provide more information concerning land use agreements than is required under 327 IAC 16-10-1. Therefore, the presiding ELJ has not considered any evidence presented at trial regarding these issues.
10. Portions of the evidence presented by Petitioners Jennings Water and the Foxes addressed whether the CFO would be able to comply with its zero discharge permit, not whether the CFO permit was submitted in compliance with legislative authority to be implemented by IDEM. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to Amendment to Approval No. AW#5076/Farm ID#6165 Confined Feedeing Operation DeGroot Dairy, Huntington County, Indiana Cause No. 05-S-J-3500.* Alleged threats to the water supply that would be caused by a operational violation of the permit are irrelevant to these proceedings.
11. The evidence on the economic impact of any potential contamination of the well field on the Petitioners, Jennings Water's customers, and the impact of potential contamination on the economic development of Jennings County is irrelevant to these proceedings. Petitioner Jennings Water's May 3, 2007 Motion to Supplement the Record with a press release concerning legislative appropriations for economic development will not be stricken, but the noted objections are considered for the weight to be given to this evidence.

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12. Whether the finder of fact may rely on the 1994 version of the Midwest Plan Service Book is a question of law. Witnesses for IDEM testified that the guidance document directing permit applicants to use the 1994 edition was created prior to the publication of the 2005 edition, and that IDEM personnel were in the process of reviewing the 2005 edition to see if the guidance would be changed. IDEM's guidance to permit applicants to use the 1994 version is reasonable. The evidence on the plans' failure to meet the requirements of the 2005 edition of the Midwest Plan Service Book is irrelevant to the determination of whether the permit application met the applicable standards stated in statute or rule.
13. The evidence presented by Jennings Water during the rebuttal portion of the final hearing was available for and should have been included as part of the Petitioner's case-in-chief. The evidence was not presented in response to IDEM's witnesses' testimony, as Petitioners should have anticipated that IDEM experts would testify that the design was adequate. Additionally, Petitioners had the burden of demonstrating that the facility as permitted does not meet the requirements. Purported evidence that the design was inadequate should have been presented as part of Petitioners' case-in-chief. It is within the discretion of the finder of fact to refuse to admit testimony that should have been offered during the case-in-chief. *Coffman v. Austgen's Elec., Inc.*, 437 N.E. 2d 1003, 1006 (Ind.App.1982). The Court hereby overrules IDEM's objection to the testimony and exhibits of Mr. Curry and Mr. Elliot on August 3, 2006; that testimony and those exhibits are admitted. The Court further overrules the objection to allow IDEM's submission of further testimony offered on August 3, 2006. However, substantial evidence has been presented in the record that the building design was adequate.
14. One issue before the OEA in this matter was whether or not the evidence introduced by the Petitioners was adequate to show that the CFO non-discharge NPDES Permit issued by IDEM to the Respondent Lykins placed the Petitioners in immediate future harm. Specifically, is the failure of the proposed building imminent, and will that failure, with certainty, cause immediate future harm to the Petitioners?
15. While the Petitioners showed that some design changes might possibly improve the proposed building, substantial evidence was not introduced at the hearing to prove that the failure of the proposed building was imminent. Further, if there were to be a failure, the Petitioners failed to offer substantial evidence to show that such a failure was certain to cause them immediate future harm. The ELJ must take into account that if the proposed building were to begin to allow contamination, the regulations under which the Respondent operates require the Respondent to take corrective action. As mentioned earlier, this Court cannot assume that the Respondent will not act in a legal manner. Therefore, the Petitioners have failed to show that they are in danger of immediate future harm.

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16. The applicable rules or statutes do not require that the plans submitted by a CFO permit applicant be prepared by or reviewed by a licensed engineer. The plans were reviewed by IDEM employees with the proper qualifications for their positions.
17. Petitioners have not demonstrated that IDEM failed to comply with any rule or statute that applies to the issuance of CFO permits. The CFO permit application complies with all the regulatory and statutory requirements, and its issuance was neither arbitrary nor capricious.

**Final Order**

**IT IS ORDERED, ADJUDGED AND DECREED** that the Petitions for Administrative Review are hereby **DENIED** and the existing agreed stay is hereby **VACATED**.

You are further notified that pursuant to the provisions of Ind. Code § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative decisions of the Commissioner of the Indiana Department of Environmental Management. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED this 29th day of June, 2007.**

Honorable Mary L. Davidsen  
Chief Environmental Law Judge